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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

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JAMES H. McKENNEY

No. 227.

BEHN, MEYER & COMPANY, PLAINTIFFS IN ERROR,

vs.

CAMPBELL & GO-TAUCO.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR DEFENDANTS IN ERROR.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Defendants in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 25414

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Statement.

This case is brought here by writ of error to review a judgment of the Supreme Court of the Philippine Islands in favor of Campbell & Go-Tauco, plaintiffs below and defendants in error here, in the sum of $9,250.62, Mexican currency, and costs (Rec., 96-105).

The action was begun in the Court of First Instance of the City of Manila, the plaintiffs, Campbell & Go-Tauco, partners and contracting builders, seeking to recover a balance of $9,250.62 claimed to be due them for work done and materials furnished under a contract between them and Behn,

Meyer & Company for the construction of a dwelling-house in the city of Manila.

The complaint (Rec., 1) in substance alleges:

That on the 20th day of June, 1901, the plaintiffs contracted in writing with defendants (*a*) to build a dwelling-house on land of said defendants on the Pasig river near Malacañan palace, in Manila, as per plans and specifications attached to the contract, for the sum of 13,000 pesos, to be paid as follows, viz: "4,000 pesos when the necessary materials are on the ground and work commenced; 4,000 pesos when the house is finished with walls, roof, etc.; 5,000 pesos on the completion of the work, which will be completed within three months;" (*b*) to install a water system to stable, kitchen, baths and water-closets, and rain-tubes from the same, for the sum of 500 pesos, and (*c*) to construct a stable according to specifications for the sum of 1,500 pesos, payment upon completion.

The complaint further alleges that plaintiffs have fulfilled their part of the contract; that any delay in its completion was due to changes, alterations, and modifications ordered and contracted for by defendants, and that there is due and owing to plaintiffs from defendants a balance of 1,000 pesos for work done under the contract on the dwelling-house and 500 on account of the installation of the water system etc. (complaint, par. IV, Rec., 2).

Plaintiffs further claim 5,417.50 pesos for alterations and additions to the work provided for in the original contract, consisting of an addition to the house, paving, and ceiling, all authorized and contracted for by defendants (complaint, pars. V and VI, Rec., 2), and $2,333.12 is claimed on account of further specified alterations, changes, and modifications made at defendants' request, thus bringing the total claim up to 9,250.62 pesos (complaint, par. VIII).

Defendants in their answer (Rec., 3-6) admit the making of the contract set up in the complaint and the subsequent agreement covering the addition to the house and the

paving, amounting to 4,000 and 305 pesos respectively, but deny that the work on ceiling, 1,112.50 pesos, and the items mentioned in paragraph VIII of the complaint, amounting to $2,332.12, were authorized by them. Defendants disclaimed any liability under the contract, and, by way of counter-claim, set up a claim of $30,000 Mexican for damages sustained by reason of faulty construction of the house, and a further counter-claim of $41,197.63 Mexican on account of an alleged overpayment on a contract for the filling of a certain lot on the bank of the Pasig river with earth and sand.

Answering to this counter-claim, plaintiffs denied both items, and set up that under the contract for filling the lot there was an unpaid balance of $2,279.55 Mexican still due them, for which they also prayed judgment (Rec., 8).

Subsequently defendants filed an amended answer (Rec., 9), cutting down their counter-claim for damages from faulty construction from $30,000 to $13,000 Mexican, and increasing their counter-claim for overpayment on the filling contract from $41,197.63 to $54,275 (Rec., 9).

The contract for the construction of the dwelling-house and stable (Plaintiffs' Exhibit A, Rec., 3) is as follows:

"MANILA, P. I., *June* 20, 1901.

"Messrs. Campbell & Go Taoco likewise agreed to construct for Messrs. Behn, Meyer & Co. a dwelling-house upon the property referred to, for the sum of thirteen thousand pesos Mexican, in accordance with the annexed plan and specifications. Upon this property there shall be made to Messrs. Campbell & Go Taoco three payments: Four thousand when the necessary materials shall have been placed upon the ground and the work shall have been begun; four thousand pesos when the house is finished, with its walls, roof, etc.; and five thousand pesos upon the completion of the work, which must be within three months.

"For the installation of drinking water in the stables, kitchen, baths, kitchen, and water-closets, and

the drainage necessary for the same, we agree to pay five hundred pesos.

"For the erection of a stable in accordance with the conditions as set forth, fifteen hundred (1500) pesos Mexican, payable upon the completion of the work. Accepted.

"*Per pro* BEHN, MEYER & Co.
"(Signed) J. KATENKAMP.
"(Signed) O. F. CAMPBELL.
"(Signed) G. C. TOACO."

The following are the specifications for the construction of the house (Defendants' Exhibit A2, Rec., 6):

"Statement of terms and conditions governing the construction of a house of strong materials upon certain premises situated on Calle Malacañan, district of San Miguel, its owners being Behn, Meyer & Co.

"1. The house shall have a frontage of 24 yards by 20 in depth and 7½ in height.

"2. The foundations shall be of ordinary stone of Guadalupe, and shall be 100 m. by 100 m. in depth, with piers 1.00 m. by 0.60 m. wide. The masonry of the lower story shall be of that class of stone ordinarily called Guadalupe 0.16 m.

"3. The stanchions or supports shall be made of Apitong, Macasim, or Amoguís wood, with scantlings 0.20 by 0.20 m. The framework, roof, cross-beams, angle rafters, sockets, king-posts, props, and partition framework shall be constructed of Apitong, Macasim, or Amoguís; the scantlings of the props shall be 0.12 m. by 0.07 m.

"4. The partitions of the principal story or floor shall be of boards made of the above-mentioned wood ½ inch thick. The boards for the floor of the principal story shall be all of Amoguís or Tagili.

"5. The windows shall be of shells of the country. The doors of the rooms of the principal story and the outhouses of the ground floor shall be of Macasim or Apitong, and the balconies of the gallery shall be of wood of a like class.

"6. The principal staircase shall have a width of 1.40 m., with banisters and balustrades 0.05 m. by 0.05 m., and another servants' staircase 0.05 m., wide and made of second-class wood.

"7. The painting of the entire exterior shall be in oil and the entire interior of whiting, except the doors, which shall be varnished.

"Manila, June 30, 1901.

"(Signed) CAMPBELL & GO TOA."

The contract for the filling of the lot on the Pasig river, of even date with that for the construction of the house, is as follows (Defendants' Exhibit D, Rec., 7):

"MANILA, P. I., *June* 20, 1901.

"We, Campbell & Go-Tauco hereby agree to and with Behn, Meyer & Company, city of Manila, upon their signed acceptance, to fill up a certain lot lying on the bank of the Pasig river, next to Malacañan palace, with a suitable filling composed of earth and sand of good quality, at the rate of one dollar and thirty cents ($1.30) Mexican currency, per cubic meter. Material will be measured in whatever way the said Campbell & Go-Tauco, with the approval of Behn, Meyer & Co., deem most expedient, then spread evenly over the ground to bring the lot to a certain level, which level will be determined by Behn, Meyer & Co. The amount to be furnished will be over fifteen thousand (15,000) cubic meters, and delivered at the rate of five thousand cubic meters monthly, unless some unforeseen cause, as storms, etc., make it impossible. Accepted.

"(S'g'd) BEHN, MEYER & Co.
" GO-TAUCO,
" O. F. CAMPBELL,
Contractors."

On trial before the Court of First Instance that court found in favor of defendants, dismissing the complaint and entering judgment for defendants in the sum of $52,000 Mexican on their claim for overpayment on the filling contract (Rec., 9-12).

The case coming before the Supreme Court of the Islands, the judgment of the lower court was reversed "and judgment ordered for the plaintiffs for the sum of $9,250.62 Mexican currency, with costs of both instances" (Rec., 96-105).

From this judgment of the Supreme Court of the Philippines the defendants, Behn, Meyer & Company, prayed an appeal to this court, which was allowed April 30, 1904 (Rec., 106).

The cause (No. 107, October term, 1905), coming before this court, was dismissed at the last term for want of jurisdiction (200 U. S., 611).

Immediately thereafter defendants, Behn, Meyer & Company, sued out the writ of error (Rec., 112) which brings the cause before this court for a second time.

I.

The scope of review upon this writ is limited to questions of law; the findings of the Supreme Court of the Philippine Islands as to matters of fact are conclusive and are not here open to review.

When this cause was before this court at the last term, on appeal, it was argued in behalf of appellees that the case should be dismissed:

> "Because this case is an action at law, and under the provisions of section 10 of the act of July 1, 1902 (32 Stat., 691, 695), conferring appellate jurisdiction on this court over the Supreme Court of the Philippine Islands, should have been brought up by writ of error and not by appeal."

And the case of *Deland vs. Platte County,* 155 U. S., 221; *Walker vs. Dreville,* 12 Wall., 440, 442, and other cases holding that final judgments in cases at law could only be reviewed upon writ of error, were cited in support of this position.

This view of the case was taken by this court, as appears from the *per curiam* opinion (200 U. S., 611), as follows:

> "Dismissed for want of jurisdiction. Act July 1, 1902, 32 Stat., 691, c. 1396, sec. 10; *Deland v. Platte County,* 155 U. S., 221; *Comstock v. Eagleton,* 196 U. S., 99; *Oklahoma City vs. McMaster,* 196 U. S., 529; *Walker v. Dreville,* 12 Wall., 440."

Although it was thus held that this court would not entertain jurisdiction of the case to review the judgment below on both law *and facts* by way of appeal, precisely the same scope of review—on *facts* as well as law—is now sought by way of writ of error. Plaintiffs in error again question the correctness of the findings of the court below on matters of fact and seek review of those findings of fact on this writ of error. They ask this court to examine the evidence and to determine whether or not it supports the findings of fact made by the court below. In other words, under the guise of a writ of error, they now seek to open up the whole case just as if it were again before the court on appeal, thus disregarding the fundamental difference between appeal and writ of error and asking the court to do what it so plainly declined to do—examine the whole case upon the evidence.

That the whole burden of complaint of these plaintiffs in error is that the Supreme Court of the Philippines misinterpreted the evidence and based erroneous findings and judgment thereon is apparent from their assignment of errors (Rec., 110).

This case involves two distinct claims or matters of suit—(1) a claim for $9,250.62, Mexican currency, for work done and materials furnished by plaintiffs in the construction of a certain dwelling-house for defendants, to which defendants (plaintiffs in error here) opposed a counter-claim for damages for faulty construction of the house, in the sum of $13,000, Mexican; and (2) a second counter-claim, amounting to $54,275, Mexican, for alleged overpayment by

defendants to plaintiffs on account of the filling of a certain lot with sand and earth. Thus the court below had two general questions of fact before it for determination:

(1) As to the construction of the dwelling-house—whether plaintiffs had done the labor and furnished the materials claimed, and whether or not the house was properly constructed; and

(2) As to the filling of the lot—whether or not there was an overpayment on account of the earth and sand delivered.

As to the construction of the dwelling-house, the court below, in its opinion, made the following specific findings (Rec., 100):

> "From the evidence in this case, it must be found as conclusions of fact:
>
> "1. That in the construction of the building the contract, plans, and specifications have been complied with, with the exception of a variation to the advantage of the owner, which is that the principal posts rests upon layers of stone, instead of upon the ground, as called for by the plan.
>
> "2. That if there has been any variation from the original plan, this was done largely, if not wholly, with the consent of the owner, and, at all events, with that of his agent, the inspecting engineer, and that these changes have been improvements.
>
> "3. That the house was constructed under a contract and specifications which did little more than to designate the size of the building, the material to be employed, and, with the plan, gave a drawing of the building, leaving the details necessarily almost completely to the direction of the inspecting architect or engineer.
>
> "4. That the owner entrusted the direction of the work to an inspecting engineer selected by himself, with full authority to represent him, and that the contractor has performed the work solely in accordance with the direction of the said inspecting engineer.

"5. That although there is some evidence to indicate that a part of the house has settled more than other parts, this is due either to the ground itself or to a defect in plan, or to the directions of the inspecting engineer, and cannot be attributed to a failure on the part of the contractor to comply with the conditions of the contract.

"6. If there are any cracks in the floor and in the joints in the building, this is due to the class of lumber which was selected by the owner.

"7. That the plan of the work and the placing of the principal posts were approved by the city engineer and were in conformity with the ordinances.

"8. That the owner took possession of the house in the month of May, 1902, and has occupied it since that time as a dwelling-house."

And upon these facts, so found, the court gave judgment for the plaintiff as follows (Rec., 101):

"It follows that inasmuch as the plaintiffs complied with their contract and constructed the house according to the plans and specifications and under the directions of the defendants or their authorized agents, they are entitled to recover therefor the unpaid balance as found by the court below, viz., $9,250.62, Mexican currency."

The third assignment of error (Rec., 110) sets forth that the Supreme Court of the Philippine Islands erred in finding the foregoing as matters of fact.

As to the filling of the lot and the quantity of earth and sand delivered for that purpose, the Supreme Court of the Philippines made no specific finding of facts, the court saying after a review of the evidence on this point (Rec., 103):

"The evidence, therefore, is uncertain and does not enable us to accurately determine the exact number of cubic feet of sand or earth delivered on the lot; and this is especially true when the evidence shows that the conclusions of the defendants' experts are disputed by two experts called by the plaintiff, experts

> of larger experience than those of the defendants and equally as competent to give opinions on this question."

The court did, however, find (Rec., 102) that:

> "The defendants, by their own books and receipts, and as measured by their own agents or servants, showed that they received and paid for 62,690.50 meters of sand and earth."

And also (Rec., 104) that:

> "There is no proof that any fraud or deceit was practiced on the defendants in the matter of measurements or in the keeping of the accounts thereof."

And again (Rec., 105) that:

> "No fraud or deceit is proved, and no mutual mistake is shown by unmistakable evidence."

The court then applied the law of the case, saying (Rec., 105):

> "This case, in the absence of evidence of a mutual mistake, is governed by the doctrine of estoppel. The defendants measured the sand, they receipted for it, and they paid for it. They cannot now say that they did not receive it."

And thereupon the court gave judgment against the defendants on their counter-claim as follows (Rec., 105):

> "It follows that the defendants are not entitled to recover from the plaintiffs the said sum of $52,000, Mexican currency, allowed by the court below."

Now, it is settled law that this court will not review on writ of error questions of fact. Even in cases of equity or admiralty jurisdiction, when before the act of March 3, 1803, they were brought up on writ of error from the circuit or district courts, this court would not examine into the facts although the evidence was also transmitted. "If such

causes are removed with a statement of facts, and also with the evidence, still the statement is conclusive, as to all the facts contained in it."

Wiscart vs. Dauchy, 3 Dall., 324.

Indeed, this court has always been inhibited by the Judiciary Acts from reversing any judgment upon writ of error "for any error in fact."

Act of September 24, 1789, Sec. 22 (1 Stats., 73).
Act of March 2, 1803 (2 Stats., 244).
Act of February 18, 1875 (18 Stats., 318).

Section 1011 of the Revised Statutes provides:

> "There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, *or for any error in fact.*"
>
> *Miles vs. United States,* 103 U. S., 304, 313.

As said by this court in *Martinton vs. Fairbanks,* 112 U. S., 670, 672:

> "The provision of section 1011, Revised Statutes, continues in force and forbids a reversal of the judgment of the circuit court for any error of fact. Upon the issues of fact raised by the pleadings in this case there was a general finding for the plaintiff. The defendant contends that the evidence submitted to the court did not justify this general finding. But, if the finding depends upon the weighing of conflicting evidence, it was a decision on the facts, the revision of which is forbidden to this court by section 1011. If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff, he should have presented that question by a request for a definite ruling upon that point."
>
> * * * * * * *
>
> (Page 673.) "The proposition that the general finding of the court in this case is open to review is

in direct opposition to the rulings of the court in the cases cited. The plaintiff in error seeks to make the question whether the evidence set out in the bill of exceptions justified the finding by the court for the plaintiff of the issue of fact raised by the pleadings. This is, in defiance of the decision of this court that it cannot be done, an attempt upon a general finding to bring up the whole testimony for review by a bill of exceptions.

"The theory of the plaintiff in error seems to be that the general finding in this case, like a general verdict, includes questions of both law and fact, and that, by excepting to the general finding, he excepts to such conclusions of law as the general finding implies. But section 649, Revised Statutes, provides that the finding of the court, whether general or special, shall have the same effect as the verdict of a jury. The general verdict of a jury concludes mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the court upon a question of law."

Where, as under the provisions of the act of March 3, 1865 (13 Stats., 501), a cause is tried by the court without the intervention of the jury, the findings of the court below, whether general or special, are given the same effect as the verdict of a jury. When the finding of the court is special, "the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Section 649, Revised Statutes, provides:

"Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700, Revised Statutes, is as follows:

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court

> without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Where the record discloses no finding of facts and the court below has jurisdiction, there are no questions open to review by this court.

Floyd vs. McWilliams, 137 U. S., 576.

A special finding is thus defined by the court in *Norris vs. Jackson*, 9 Wall., 125, 127, as—

> "Not a mere report of the evidence, but *a statement of the ultimate facts on which the law of the case must determine the rights of the parties;* a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest.
>
> * * * * * * *
>
> "In the case of a special verdict, the question is presented, as it would be if tried by a jury, whether the facts thus found required a judgment for plaintiff or defendant; and this being matter of law, the ruling of the court on it can be reviewed in this court on that record."

If a party desire to have the findings reviewed, he must have the court find the facts specially.

Coddington vs. Richardson, 10 Wall., 516.

Parties desiring a review of the law involved in the case must either get the court to make special findings or must present to the court their propositions of law and require a ruling on them.

Norris vs. Jackson, 9 Wall., 125.

Insurance Company vs. Sea, 21 Wall., 160.

The findings of the court below are conclusive if there be any evidence to support them.

Grayson vs. Lynch, 163 U. S., 468, 476.

See also—

Graham vs. Bayne, 18 How., 60, 62.
Insurance Company vs. Tweed, 7 Wall., 44.
Generes vs. Campbell, 11 Wall., 193, 199.
Insurance Company vs. Folsom, 18 Wall., 237, 248.
Lehnen vs. Dickson, 148 U. S., 71.
St. Louis vs. Western Union Telegraph Co., 166 U. S., 388.

Any inquiry into the facts of this case is hence clearly outside the scope of this review. The findings of the Supreme Court of the Philippines (Rec., 100) as to the construction of the house, its conformity to the plans and specifications and the directions of defendants' architect, and the work done and materials supplied, are all conclusive here. The facts so found are not now open to question. The only question now open for review and determination is whether, upon the facts so found, the court below was justified in point of law in awarding judgment in plaintiffs' favor for the amount of the unpaid balance. In other words, whether the "ultimate facts" thus found require or support a judgment for the plaintiffs. There being no question as to the amount of this unpaid balance—$9,250.62, Mexican—and the court below having found that "the plaintiffs complied with their contract and constructed the house according to the plans and specifications and under the directions of the defendants or their authorized agents," we think the correctness in point of law of entering judgment in plaintiffs' favor can hardly be questioned.

And as to the filling of the lot and defendants' counterclaim for the alleged overpayment, while the court below has not so formally stated its findings of fact as it has done in

the matter of the construction of the house and defendants' first counter-claim, we will nevertheless concede to the statements contained in the opinion, as to the ultimate facts in this matter, the force and effect of special findings of fact; otherwise any review on the matter of this second counter-claim is precluded.

Norris vs. Jackson, 9 Wall., 125.
Coddington vs. Richardson, 10 Wall., 516.
Insurance Company vs. Sea, 21 Wall., 160.

We have, then, these special findings by the court below:

(Rec., 102:) "The defendants, by their own books and receipts, and as measured by their own agents or servants, showed that they received and paid for 62,690.50 meters of sand and earth."

* * * * * * *

(Rec., 104:) "There is no proof that any fraud or deceit was practiced on the defendants in the matter of measurements or in the keeping of the accounts thereof."

* * * * * * *

(Rec., 105:) "No fraud or deceit is proved, and no mutual mistake shown by unmistakable evidence."

The defendants having received, receipted, and paid for the 62,690.50 meters of sand and earth, as measured by their own agents, and there being no evidence that fraud or deceit was practiced on defendants, either in the matter of making the measurements or of keeping the accounts thereof, and no mutual mistake having been proved, it seems to us the court below was clearly right in ruling as it did, that defendants were estopped from denying or avoiding their receipts and could not recover back the money paid. That such is the law has been very clearly ruled by this court in the case of *Chicago & Santa Fé Railroad vs. Price,* 138 U. S., 185, and in many other cases which we shall hereafter cite.

II.

The house being constructed in compliance with the plans and specifications and under the direction of appellants' authorized agents, defendants in error, are entitled to recover the unpaid balance of $9,250.62 Mexican.

Assuming, however, for the argument that this court could review the evidence and find the facts, without regard to the findings already made, and passing to a consideration of the merits of the cause, we respectfully submit that the court below committed no error, either of law *or fact,* in awarding judgment in favor of plaintiffs (defendants in error here) for the balance of $9,250.62 due on account of the construction of the dwelling-house and plumbing, and in setting aside the judgment of $52,000 for defendants entered by the Court of First Instance on their claim for overpayment on the filling contract.

Taking up first the original claim for work done and material furnished in the construction of the house, we find from the evidence that any defects existing in the construction of the building are the result either of imperfections and mistakes in the original specifications or of the instructions of the superintending engineers in charge of the supervision of the construction work and employed by Behn, Meyer & Company. Such being the case, it is clear that no fault can be attributed to defendants in error by reason of such defects, and no claim of plaintiffs in error for resultant damages can be sustained.

Mr. Campbell, the managing partner of the firm, testifies (Rec. 16, 17) that the construction work on the house was under the constant supervision of a superintendent employed by Behn, Meyer & Company. An engineer named Duff was first employed, and after his death an engineer named Cook.

These engineers superintended the work during the entire time of construction, visiting the work daily and giving con-

stant directions, and making changes and alterations in the plans as the work progressed (Rec., 19-20). The testimony of Behn, Meyer & Co.'s manager, Arnold Dittmar, agrees with this. He testifies (Rec., 30) that as superintendent or surveyor it was Duff's duty, and he had power, to see that the building was properly carried out. The testimony of Mr. Campbell as to the items set out in the eighth paragraph of the complaint (Rec., 2) is precise and definite (Rec., 21-26), and the correspondence between Behn, Meyer & Company and their engineer, Duff, and the defendants in error (Rec., 88-90) shows the constantly recurring alterations in the original plans, all made at the instance of plaintiffs in error.

The witness D. W. SMITH, an expert builder, who had been engaged in the construction business in the Philippines over three and a half years, testifies (Rec., 34), after an examination of the house as constructed and the original plans, that the work done on the building complied with the original plan and contract and that such changes as had been made were improvements.

VINCENTE W. PASTOR, a civil engineer of twenty years' professional experience, fifteen years in Manila, testifies at some length (Rec., 34-39). The substance of his testimony is that the building as constructed fully meets the requirements of the plans and specifications; that the quality of lumber used in the doors is of higher grade than called for in the specifications; that the foundations are better than called for by the original contract, and that such modifications of the original contract as have been made are in the nature of improvements. Mr. Pastor testifies that he found all the items of work claimed in paragraph 8 of the complaint (Rec., 36).

CAYETANO ARGUELLES, an architect, who has practiced his profession since 1884, testifies (Rec., 40-41) that he has examined the house and also the original plans; that the modifications of the original plans are in the nature of improvements; that the foundation has more pillars than

called for by the original specifications; that the foundations are of sufficient strength and meet the requirements of the Manila building ordinances, and that the roof and flooring are well constructed.

Plaintiffs in error relied on the testimony of Major James F. Case (Rec., 41-56) and Robert M. Loper, an inspector of buildings, but without professional qualifications, (Rec., 58-73), to sustain their counter-claim of damage for defective construction. An analysis of the testimony of these gentlemen, however, shows that the defects which they observed in the construction of the house were the result of defects in the original plans or of the use of inferior material called for expressly by the specifications.

Major Case testifies (Rec., 42) that he found certain of the supporting posts or timbers running down half way through the stone foundations, which in his opinion is bad construction, but on cross-examination and after looking at the plan approved by the municipal authorities he admits (Rec., 49) that the plan provided for the posts or pillars passing through the foundations and resting on the ground. He then states (Rec., 49-50) that the method of construction adopted by Campbell & Go-Tauco made a stronger foundation than that provided for in the plan approved by the municipal authorities.

The specifications call for the use of Apitong, Macasim or Amoguís wood for supports, framework, etc.; for Amoguís or Tagili lumber in the flooring, and for Macasim or Apitong wood for the doors. Major Case (Rec., 53) and the witness Loper (Rec., 68) both testify that these woods are of the third or most inferior group or class of lumber as classified by the Forestry Bureau of the islands. Major Case says that lumber of this class is spongy or porous, shrinks and swells with change of temperature, causing the joints to open. Yet this was the kind of lumber called for by the contract, and it is manifest that the defects noted by the witnesses result, not from defects of workmanship, but from the inferior character of the materials called for by the specifications. Major

Case states (Rec., 50) that the joints of the supporting pillars would have been improved if iron straps had been used to reinforce the bolts, but admits that these were not called for by the specifications. The testimony of this witness practically admits that the specifications of the contract were substantially complied with, except where modified to the improvement of the construction, as in the case of the supporting pillars (Rec., 49-50).

The witness PASTOR, called in rebuttal, testifies (Rec., 81-84) that he finds no defect in the foundations; that there was some shrinkage in the rafters, usual in the case of lumber of the kind employed, and that the alterations described in the complaint materially improved the building. When asked to give his opinion of the building, he says (Rec., 84):

> "Now, taking as a base the kind of materials from which this work was done, and comparing the plans with the specifications, I find that the work could not be done in any other way than that in which it was done. I find the building to be acceptable; that the specifications were complied with, except a few defects which are due to the condition of the materials themselves; but they are very small. Therefore I don't find any reason that this job could be rejected by any person who contracted for its construction. That is all I have to say with reference to the house.
>
> "Q. With reference to the bath-rooms in this house, do you believe that they are not baths, and in case they are, that they cannot be used as stated by the witnesses for the defense?
>
> "A. In the first place, neither the specifications nor the plan state what kind of baths are to be built. Now, in my opinion, taking into consideration the plan and specifications, I believe that the contractors have done more than what they ought to—against their own interest."

The dwelling-house was finished in the spring of 1902, and the plaintiffs in error accepted it by moving into it early in May of that year. Mr. Dittmar, manager of Behn, Meyer

& Co., testifies that he has occupied the house continuously up to the time of trial (Rec., 29).

Upon examination of the whole evidence on this branch of the case the Supreme Court made the following findings of facts, which we submit the proof fully sustains (Rec., 100):

> "1. That in the construction of the building the contract, plans, and specifications have been complied with, with the exception of a variation to the advantage of the owner, which is that the principal posts rest upon layers of stone, instead of upon the ground as called for by the plan.
>
> "2. That if there has been any variation from the original plan, this was done largely, if not wholly, with the consent of the owner, and at all events, with that of his agent, the inspecting engineer, and that these changes have been improvements.
>
> "3. That the house was constructed under a contract and specifications which did little more than to designate the size of the building, the material to be employed, and, with the plan, gave a drawing of the building, leaving the details necessarily almost completely to the direction of the inspecting architect or engineer.
>
> "4. That the owner entrusted the direction of the work to an inspecting engineer selected by himself, with full authority to represent him, and that the contractor has performed the work solely in accordance with the direction of the said inspecting engineer.
>
> "5. That although there is some evidence to indicate that a part of the house has settled more than other parts, this is due either to the ground itself or to a defect in plan, or to the directions of the inspecting engineer, and cannot be attributed to a failure on the part of the contractor to comply with the conditions of the contract.
>
> "6. If there are any cracks in the floor and in the joints in the building, this is due to the class of lumber which was selected by the owner.
>
> "7. That the plan of the work and the placing of the principal posts were approved by the city en-

gineer and were in conformity with the ordinances.

"8. That the owner took possession of the house in the month of May, 1902, and has occupied it since that time as a dwelling-house."

These being the facts of the case, the action of the court below in awarding judgment for the balance claimed under the contract is, we respectfully submit, correct in law, and should be affirmed for the following reasons:

(1.) Because plaintiffs in error, having entrusted the direction and supervision of the work to an inspecting engineer selected by and having full authority to represent them, became responsible for any defects resulting from his instructions, directions, or modifications of the original plans and specifications.

(2.) Because, as shown by the evidence of plaintiffs in error's own witnesses, the only departures from the original contract plans and specifications were improvements of the structure as originally planned and directly to Behn, Meyer & Company's advantage.

(3.) Because plaintiffs in error, by taking possession of the house upon its completion and occupying it ever since, have in legal effect accepted same, waived any defects in its construction, and become liable for the full contract price.

(1 and 2.)

The contract is a lease of services for construction work, comprised in chapter 3, Book 4, title 6, of the Civil Code, according to which the contractor is under the obligation of erecting a building, supplying material selected by the owner, and being responsible for the work done by persons whom he employs on the work (articles 1588, 1589, etc., down to 1596 of the Civil Code).

According to article 1591, the architect or inspecting engineer is responsible if the defect is due to his direction or to a defect in the ground, and the contractor does not share this

responsibility with the architect or the engineer (judgment of the Supreme Court of Spain of March 20, 1893).

According to this decision, the architect in charge of the work performed by the contractor is responsible for compliance with the general rules of his profession as applied to the work, and subject to the plans provided by the owner of the building, in the absence of a contrary agreement.

In this case it appears from the evidence that the inspecting engineer was the special agent of the plaintiffs in error, through whom the latter always acted.

From the letters introduced in evidence (Rec., 26, 87) it appears that all their negotiations with the contractor have been through the mediation of this inspector, and that it was his especial duty to see that the work was performed in accordance with the desires of the owners, and although this engineer has changed the plan with respect to the principal posts, which, according to plan, should have rested on the ground, and put them upon layers of stone, this variation has been to the benefit of the owners, and therefore they cannot complain of it, because article 1715 of the Civil Code provides:

> "The scope of the authority shall not be considered as exceeded if it should be fulfilled in a manner more advantageous for the principal than that specified by him."

Furthermore, it may be said, as to the conduct of the owners and the dealings between the parties, that there was an implied agreement between them that this inspecting engineer was to approve the work, and consequently the case falls within the last clause of article 1598, Civil Code, which says: "If the person who has to approve the work is a third person, his decision shall be final."

It appears in this case that all parties agreed that the engineer employed by Behn, Meyer & Co. was to be the one who was to give his approval both as to the form and manner of the execution of the work. At all events, it may

be said that appellants are bound in this case to abide by the results of the actions of this inspecting engineer, because by their conduct he has led others to believe that such was their intention. Article 1727 of the Civil Code provides:

> "A principal must fulfill all the obligations which the agent may have contracted, within the scope of his authority.
>
> "A principal is liable, in so far as the agent has exceeded his power, only when he ratifies the same, expressly or in an implied manner."

It is to be observed that that part of the contract which refers to the duties and powers of the inspecting engineer does not appear to have been expressly agreed upon or at least was not reduced to writing, and we must therefore observe the conduct of the parties for the purpose of understanding the terms of the agreement; as the contract only serves to indicate the intention of the parties and when this intention is known the contract is known.

In this case there can be no doubt there was an expressed or implied contract of agency, and the relation of principal and agent may be created in either of these two ways (article 1710 of the Civil Code).

For the purpose of determining the intention of the parties in this case we must observe principally their conduct contemporaneous with and subsequent to the making of the contract (article 1282 of the Civil Code). This rule of interpretation would be more logically applicable to the case at bar than to a case in which a written contract exists.

It is to be observed that in the case at bar the inspecting engineer acted without a formal letter of attorney, and both he and the contractor were obliged to determine his authority from the conduct of the owners.

Mr. Dittmar, the manager of the defendants, testifies that Mr. Duff, as surveyor—and later Mr. Cook—"had power to see that the building was properly carried out" (Rec., 30).

Under such circumstances it must be understood that the

office of inspecting engineer included power to do all that might be necessary, so that, under his direction, the work might be complete. This was so held by the Supreme Court of Massachusetts in the case of *Damon vs. Inhabitants of Granby*, 2 Pick., 351. In this case authority was conferred upon the town committee to make arrangements with the contractor and to superintend the construction of a building for the town. The court held that to superintend the construction of a building includes the power to make necessary contracts.

In American cases the owner assumes the risk of the sufficiency of the plans and specifications, and must suffer any loss resulting from defects therein. It has been frequently held in the United States that a contractor erecting a building in accordance with plans and specifications provided by the owner is not responsible if the buildings are subsequently ruined by reason of defects in the plans. It is stated that the obligation of the contractor is only that of performing the work with reasonable skill in accordance with the plans furnished by the architects, and that he is not a guarantor of the strength of the building when finished or of its capacity to resist the violence of the wind (*Clark vs. Pope*, 70 Ill., 128; *Sekwastz vs. Saunde*, 46 Ill., 18; *Burke vs. Dunbar*, 128 Mass., 499; *MacRichie vs. Lake View*, 30 Ill. App., 393).

In the case of *Burke vs. Dunbar, supra*, the plaintiff contracted with the defendant for the construction of a sea wall of certain dimensions, in a complete and workmanlike manner, to the satisfaction of the defendants, at a certain price payable in installments as the work progressed. The purpose of the wall was to enclose a permanent wharf for a landing place for steamers, and was to be filled in with earth. The lines of the sea wall were pointed out by the defendant's agent and the plaintiff commenced to lay stone along these lines, upon what appeared both to the plaintiff and the agent to be a bed of sand and gravel, and upon

which they believed the wall could safely be erected. As the work progressed it appeared that this bed of sand and gravel was merely a stratum above a bed of mud some 15 feet in depth at the end of the wall and less toward the shore. As soon as the plaintiff found out that the foundation of the wall was insufficient he so notified the defendant, who told him that he would do the best he could to preserve the wall, and shortly after sent an expert in the construction of sea walls to superintend it. This expert placed a row of piles beyond the extreme end of the wall and paid the plaintiff an extra price for putting the stone already laid around these piles and for making the wall thicker than was required by the contract. The agent did not supply the pile foundation by the side of the wall, which had by this time been constructed for a short distance, and made no objection to the plaintiff constructing this wall without piles.

The proof tended to show that the defendant made the payments required by the contract when the end wall was completed and one of the side walls, and that he accepted the completed work and consented to allowing a third person to measure the wall, which he did, reporting the result to the parties, and that the defendant agreed to pay the balance to the plaintiff. The defendant's proof tended to show that the side walls had settled because there was not sufficient foundation; that the stones were not of a proper size; and that the wall was not built in a workmanlike way, but upon this point the evidence was conflicting.

The court held that the obligation of the plaintiff was to build a wall of the dimensions specified in the contract and that the plaintiff was entitled to recover the price; that the owners of the wharf contracted for its construction, providing a plan and specifications to the contractor, who built it in accordance therewith, and the latter is not responsible for the destruction of the wharf by reason of defects in the plan.

Beswick vs. Platt, 140 Pa. St., 8.

A contractor working upon plans and specifications of an architect only assumes the obligation that his work will be completed in a workmanlike way, and if he has performed the work in accordance with the plans he cannot be held responsible for damages arising from a fall of the building caused by a defect in the plan unknown to him (*Deagling vs. Gilmore,* 49 Ill., 248).

The warranty clause of the contract cannot be extended to include the liability of the contractor for a failure of work to continue in good condition by reason of defects in the plan or drawing, or because the work in particular places was performed in accordance with expressed directions of the inspecting engineer (*MacRitchie vs. Lakeview,* 30 Ill. App., 339).

On a contract for the repair of a building calling for a combination elevator both for passengers and freight, without more particular specifications, it was held that the contractor could not be held responsible for the failure to put doors on the elevator in the absence of proof that it was a custom of the trade to provide such doors in the absence of specifications, and the testimony of a witness that in his opinion doors were proper and necessary is not sufficient to establish it (*Horgan vs. McKenzie,* 17 N. Y. Supp., 174).

That a contract to supply material for the ironwork of a building and the performance of the necessary work referred to on plans and specifications which only show openings for transoms, without giving the size, weight, or data as a guide for their contruction, so that the contractor could not make them without additional plans and specifications, the construction of such transoms is not included in the contract and the contractor could properly refuse to build them (*Sexton vs. Chicago,* 107 Ill., 323). (This citation is particularly in point upon the extras charged in the complaint, as, for instance, transoms, baths, doors, windows, etc.)

An owner, by authorizing an architect to inspect the construction of a building, makes him his agent for all pur-

poses necessary for the construction and safety of the building. Therefore, when it is necessary, in order to make the building safe, he can bind his principal for extra work and material, and even modify the text of the original contract (*Gibson County vs. Motherwell Iron, etc., Co.*, 123 Ind., 364; *Clinton County vs. Hill*, 122 Ind., 215; *Harris County vs. Bryne*, 67 Ind., 21).

When the contractor has substantially performed the contract, but the result does not conform to the requirements of the contract, owing to defects in the plans or any other error or omission of the owner, the contractor is not responsible (*Manville vs. McCoy*, 3 Ind., 148; *Kundzon vs. Hanson*, 28 Nev., 591).

A contractor is not responsible for defects in the work occasioned by the material selected by the owner (*True vs. Bryant*, 32 N. H., 241).

The contractor is liable for defects only in case he has failed to comply with the conditions stipulated in the contract (article 1592, Civil Code).

This liability does not arise when from the report of the experts nothing appears beyond settlement and deterioration which can be readily repaired and at a trifling cost, and in this case the owner is under the obligation of paying the price (Judgment of the Supreme Court of Spain, June 17, 1903).

(3.)

When the owner accepts the work and makes use of it after its termination, as a general rule, it will be held that he has waived defects in the construction and is liable to the contractor for the price *Duell vs. McCraw*, 86 Hun. (N. Y.), 331; *Harris County vs. Campbell*, 68 Tex., 22; *Beswick vs. Platt*, 140 Pa. St., 28; *Katz vs. Bedford*, 77 Cal., 319; *Andrews vs. Portland*, 35 Me., 475; *Oregon Imp. Co. vs. Roach*, 117 N. Y., 527; *Dubois vs. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.), 285; *Porter vs. Stewart*, 2 Aik.

(Vt.), 417; *Waters vs. Harvey*, 3 *Houst. (Del.)*, 430; *Trowbridge vs. Barrett*, 30 Wis., 661; *Howard vs. Oshkosh*, 37 Wis., 242; *Ford vs. Smith*, 25 Cal., 675; *Hagerstown Presbyterian Church vs. Hoopes Artificial Stone Co.*, 62 Md., 598; *Potomac Steamboat Co. vs. Harlan, etc., Co.*, 66 Md., 42; *Garrison vs. Dingham*, 56 Ill., 159; *Merriweather vs. Taylor*, 15 Ala., 735; *Hawkins vs. Gilbert*, 19 Ala., 54; *Bailey vs. Woods*, 17 N. H., 365; *Lucas vs. Godwing*, 3 Bing. N. Cas., 737; and see *Johnson vs. Harvey*, 30 Md., 259; *Maysville, etc., Turnpike Road Co. vs. Waters*, 6 Dana (Ky.), 62; *Zottman vs. San Francisco*, 20 Cal., 96; 81 Am. Dec., 96; *Jewet vs. Weston*, 11 Me., 346.

This is a rule which should be applied in the case at bar, because article 1893 of the Civil Code provides as follows:

> "The owner of property or a business who avails himself of the advantages of the administration of another, even when he has not expressly ratified it, shall be liable for the obligations contracted for his benefit, and he shall indemnify the administrator for the necessary and useful expenses which he may have incurred and for the losses he may have suffered in the discharge of his duties."

The acceptance or voluntary use of the object of the contract is proof of its execution or of a waiver of non-performance.

In *Veazie vs. Bangor*, 51 Me., 509, the contract contained a provision to the effect that it would be proved that the materials have been furnished and work done in accordance with plans and specifications by the certificate of the architect. The court, awarding judgment for the contract price, said:

> "The entry of the plaintiffs into the possession and enjoyment of the building is sufficient proof that they were satisfied upon this point (performance of the contract). The production of the certificate could not have had greater effect." (See, also, *Blethen v. Blake*, 44 Cal., 120.)

When a party contracts with another to fix upon a good site for the location and construction of a mill, the acceptance of the mill is a waiver of any objection as to the site (*Emerson vs. Coggswell*, 16 Me., 77).

The house having been constructed under the direction of the owners' inspecting engineer, and it being a principle of law that the plaintiff is liable to third persons for all that may be done or said by his agent, including his negligence and admissions within the actual or apparent scope of his authority, there can be no claim against the contractor for not having performed the work in compliance with the plan and specifications, in the absence of the allegation and proof that the contractor conspired with the agent or knowingly concealed defects from the owner, and upon this point, in this case, there is an absolute lack both of allegation and proof.

It is a principle of law, so well established that it is not necessary to support it by authorities, that when the owner, by himself or by his agent, has directed the construction of a building, he cannot, in the absence of fraud, which must be alleged and proved, make any objection as to the manner of the execution of the work. If there are any defects it is his duty to speak when they occur in order that the contractor may remedy them at the least possible expense, and if he does not do so it must be concluded that he has consented to them, and after that he cannot make an objection because one is estopped from objecting to things to which he has solemnly consented (Judgment of the Supreme Court of Spain, July 13, 1894).

This is an indisputable presumption, because paragraph 1 of article 333 of the Code of Civil Procedure provides:

> "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it."

If there was any defect in the placing of the principal posts which was done under the personal superintendence and direction of the defendants' engineer, it was his duty to mention it at the time, so that it might have been corrected at a trifling expense.

To allow him to refrain from doing so and to keep silent, thereby leading the contractor to believe that the work was approved, and then permit him to speak after the house was finished and completed, would be a wrong to the contractor so grievous that no court of justice should permit it.

Many cases are cited on appellants' brief (pp. 8-17) to the effect that the taking possession of a building erected on the owner's land does not operate as an acceptance or imply a waiver of due performance of the contract of construction.

It is to be observed, however, that in these cases the courts are careful to point out that such taking possession and occupancy must be under protest in order not to operate as an acceptance of the building. Thus in *Corwin vs. Wallace,* 17 Iowa, 374, 377, the court says:

> "Such use, *under protest, accompanied with complaint that the contract had not been performed by the undertaker,* would not be a waiver of his right to insist upon the due execution of the contract."

And again, in *Wilson vs. School District,* 32 N. H., 118, 125, the court says:

> "Alone, the use of such buildings gives no evidence of acceptance. *Accompanied by silence and the absence of complaint, when to complain would be natural and suitable, or by any circumstances indicating acquiescence, it would be evidence.*"

Hanley vs. Walker, 79 Mich., 607; 8 L. R. A., 207, was an action brought to recover for plastering work performed under a contract that payments should be made upon certificate of the architect in charge of the work. The fact was undisputed that plaintiffs had *not* obtained the architect's

certificate accepting the work. Under these circumstances the court said:

> "Under the testimony appearing in this record, the fact of the defendants taking possession was not such an acceptance as relieved the plaintiffs from the terms and conditions of the contract requiring them to obtain the architect's certificate before they were entitled to payment."

Obviously in this Michigan case the withholding of the architect's certificate was in itself a protest against the character of the work performed. Moreover, the contract work was there the plastering of houses otherwise completed. The taking possession by the owner under such circumstances is widely different in effect from taking possession where the contract covered the erection and completion of the entire structure.

In *Malbon vs. Birney,* 11 Wis., 107, the contractor undertook to build a house complete. He abandoned the contract after doing but a small portion of the work. It was under these circumstances that the court held that the taking possession by the defendant did not constitute an acceptance of the small amount of work performed by the plaintiff contractor.

Again, in *Escott vs. White,* 10 Bush., 169, the court, in holding that the taking possession of the building by appellants should not be considered as an acceptance by them, said (p. 173):

> "They had no alternative but to take possession as they did, *protesting all the while that appellees had failed to comply with their agreement.*"

In the case at bar, however, there is nothing in the evidence to show that the plaintiffs in error refused to accept the house under the contract or make any protest before taking

possession. It is true that paragraph IX of defendants' answer (Rec., 4) alleges:

> "That plaintiff has not completed the defendant's dwelling-house referred to in Plaintiff's Exhibit A according to the plans and specifications also referred to therein, or at all, but has refused to do so, and has abandoned work upon the said house since about the first day of May, 1902, although frequently requested by defendant to complete said house in accordance with said contract."

There is, however, a total failure of proof to support any allegation that plaintiffs in error themselves, or by any one in their behalf, made any protest on account of the non-performance of this contract before taking possession of the house. Mr. Dittmar (Rec., 75) states that he did not accept, by writing or any agreement with Campbell & Go-Tauco, the house as finished. There is nothing, however, either in the contract (Rec., 3) or the specifications (Rec., 6) providing for any formal acceptance by Behn, Meyer & Co. or any one else, of the work done under the contract.

On page 78 of the record, Mr. Dittmar testifies thus:

> "Q. When did you occupy the building?
> "A. Beginning of May, 1902.
> "Q. Who gave the possession of this building to you?
> "A. Nobody.
> "Q. Before you took possession of the premises did you examine it?
> "A. Yes, I did.
> "Q. Where were you living before going into this building?
> "A. Calle Nozaleda.
> "Q. And after examining this new building you moved all your furniture into it, did you not?
> "A. No, I bought all new furniture.
> "Q. And you quit that house at Calle Nozaleda?
> "A. Yes."

And on page 29 Mr. Dittmar states that he has continued to occupy the house ever since the first of May, 1902. The only evidence of any representation of dissatisfaction with the work on the house before the filing of defendants answer is the statement of Mr. Dittmar (Rec., 81) that he notified the contractors several times to repair a bath tub by providing plugs. When he asked the contractors to do this does not appear, presumably after he had taken possession of the house.

It would, we submit, be manifestly unjust to hold, under the circumstances of this case, as disclosed by defendants' own testimony, that they are not bound by their act of taking possession of the house and continued occupancy *without protest or complaint up to the time when suit was instituted.* Absolutely nothing appears herein why plaintiff in error should not be estopped by these acts of acceptance from denying the full performance by appellees of their contract.

III.

The counter-claim for alleged overpayment on contract for filling lot.

The contract for the filling of the lot on the Pasig river (Rec., 7) provided for the delivery of "a suitable filling composed of earth and sand of good quality, at the rate of $1.30 Mexican currency per cubic meter. Material will be measured in whatever way the said Campbell & Go-Tauco, with the approval of Behn, Meyer & Co., deem most expedient, then spread evenly over the ground to bring the lot to a certain level, which level will be determined by Behn, Meyer & Co."

Under this contract Campbell & Go-Tauco began the delivery of the sand for filling about July 14, 1901, and continued to deliver same until the April following. The sand was delivered in bancos and was receipted for, in cubic meters, by the agent of Behn, Meyer & Company, who lived

there on the spot (Rec., 91, 3, 18, 31-2). A total of 62,690.50 meters was receipted and paid for by Behn, Meyer & Company (Rec., 86). They paid on account of the sand a total of $81,497.65 Mexican. Campbell & Go-Tauco claim that they delivered a total of 64,444 cubic meters of sand, which at the agreed price of $1.30 per cubic meter would have entitled them to $83,777.20 Mexican, or $2,279.55 more than they were paid. Inasmuch as the receipts produced covered only 62,690.50 cubic meters, the court below rejected the claim for the 1,753.50 additional cubic meters (Rec., 8, 105).

Mr. Campbell testifies (Rec., 18) that receipts were given daily by Behn, Meyer & Co.'s representative, and at the end of each week a bill in duplicate was rendered covering deliveries to date, which on being O. K.'d by the manager of the firm was presented for payment. He says:

> "I was always paid—made my bills—from the receipts given to me during the week.
>
> "Q. Before payment, would they examine the bills or receipts or any other papers?
>
> "A. I always furnished the receipts with the bills, and they looked over the receipts, and they had also their own book which they always went over, and the two books always correspond—at least the receipts and their books were the same. In case there was any discrepancy in the matter of a tenth of a meter, it was always arranged right at that moment before the bill was O. K.'d by the manager."

Payments by Campbell & Go-Tauco were made to the banca men upon the measurements made by Behn, Meyer & Co.'s representative, as shown by these same receipts. As stated by Campbell in his letter of April 30, 1902, to Engineer Cooke (Rec., 87):

> "It is the basis on which I have paid the banca men for the sand delivered me. They have been paid—meter for meter—upon the measurement adopted by the representative of Behn, Meyer & Co. and myself."

GEORGE IGNACIO CERCAL, who was one of the three men successively employed by Behn, Meyer & Co. to measure the filling material, testifies (Rec., 31-33) that he was employed by Behn, Meyer & Co. from October, 1901, to February, 1902, to measure and keep account of the sand delivered. He produced the two books in which he kept the account, which were admitted in evidence, but do not appear in this record. The witness states he entered every cubic foot of sand received on the ground. His method of computation was by measuring the load-line of the bancas and from that determining the cubic contents. He says that in so measuring he was following the instructions of Mr. Cottoncamp (Kattenkamp), Behn, Meyer & Co.'s manager.

ARNOLD DITTMAR, the managing partner of plaintiffs in error, testifies (Rec., 29):

> "Q. As the manager of Behn, Meyer & Co., did you at any time personally pay, or direct your subordinates in the office to pay, any bills for sand?
> "A. Yes, sir, I did.
> "Q. Before paying any bill, what books would you refer to?
> "A. No books, only the receipts.
> "Q. What receipts?
> "A. Receipts signed by the man employed by me.
> "Q. Have you these receipts sent to you by your employee?
> "A. Yes, sir, he brought them over himself.
> "Q. Well, have you got some of them now?
> "A. Yes, they are lying there.
> "Q. Who gave this book to you?
> "A. I had it in the office, but I couldn't say who wrote it.
> "Q. Why did you have this book in your office?
> "A. Well, we put down according to the receipts that we had receipted for, and afterwards brought the book to our office."

To disprove the entries of their own books and the receiptsof their own representatives, plaintiffs in error produced

the two witnesses, Major James F. Case (Rec., 41-57) and Robert M. Loper (Rec., 58-73). The last delivery of sand was in April, 1902. It does not appear when these witnesses made their examination, but it was certainly many months after the completion of the contract (Rec., 90). Major Case testifies that he found the superficial area of the lot to be 16573¼ square meters. Mr. Loper says it was 15,549.62 square meters (Rec., 46, 63). Neither of the witnesses appears to have been familiar with the lot in question before it was filled. Their method of computation was to sink five or six holes in different portions of the lot to what they called the original soil. Five holes gave an average depth of 1.10 meters. From these measurements the witnesses, adding 15 per cent. for settling of the fill, reach a conclusion that about 20,965 cubic meters were used in the fill (Rec., 46, 64). The land, before filling, was a zacate field "covered with very deep ditches." "In parts a paddy field, and in other parts a swamp, where the people fished and watered carabaos" (Rec., 18). Major Case admits (Rec., 46-7): "I didn't see this zacate field before it was filled up, and I didn't know how many of these little ridges there were or how many canals may have existed on the property." There is nothing in the record to show whether the holes sunk by these witnesses were where the ridges were or the canals or the more level portion. Their whole testimony is admittedly a matter of guesswork, essentially inaccurate. Major Case allows for a shrinkage of 15 per cent., but the witness Pastor states that in river sand, such as used in this fill, as high as 38 per cent. should be allowed for settling (Rec., 38-54).

There is nowhere any allegation of fraud or deception on the part of these defendants in error, and the only attempt on the part of the plaintiffs in error to disprove the accuracy of the records kept by their representative is by the introduction of the testimony of Major Case and Loper,

neither of whom was familiar with the land before it was filled up.

As to the evidence on this branch of the case, the court below says (Rec., 102-104):

> "The burden of the proof is on the defendants to show that they did not receive the 62,690.50 cubic meters of sand and earth, and on the plaintiffs to show that they delivered 1,753.50 cubic meters of sand and earth for which they were not paid.
>
> "Pursuant to their contract, the plaintiffs began to deliver the sand and fill the lot on or about July 14, 1901, and continued to deliver the same until April, 1902.
>
> "The sand was measured in bancas by the agent or servant selected and paid by the defendants. Receipts for this sand were given daily to plaintiffs, and at the end of each week duplicate bills were rendered by them to the defendants, which were O. K.'d by the manager of the defendant's firm and then paid.
>
> "The authorized representative of the defendants who gave the receipts was on the ground constantly to receive this sand—in fact, he lived on the ground. The sand was taken from the river and was wet when delivered.
>
> "The defendants kept a book account of all sand delivered. The plaintiffs kept a man there to see to it that all the filling went on and to take the receipts from defendant's representative. One of the representatives of the defendants, who measured the sand, was called by the plaintiffs as a witness and testified that he measured the water line of the bancas containing the sand. That the number of cubic meters of sand were told by certain marks on both sides of each banca, and that he was instructed by the manager of the defendants that it was not necessary to measure the bancas. The defendants, by their own books and receipts, and as measured by their own agents and servants, showed that they received and paid for 62,690.50 meters of sand and earth.
>
> "In order to disprove their own admissions and books, they called two expert witnesses to show that this amount of sand and earth was not on the lot in

question at the time of the measurement of these witnesses—presumably after September 6, 1902, for in the letter of the defendants to the plaintiffs of that date the former do not appear to have had the figures subsequently given by these witnesses—and many months after the sand and earth was all delivered.

"The defendants did not call as witnesses any of their own agents or servants who measured this sand at the time of delivery, nor any of the banca owners or managers to show the amount delivered.

"The lot which was filled contained, according to defendants' witnesses, a superficial area of 16,573.50 sq. meters.

"It was, before it was filled, a rough piece of land, covered with very deep ditches, in part a paddy field and in part a swamp where people fished and watered their carabaos. The defendants' experts made a survey of this lot, and an examination of the sand thereon, many months after it was deposited, with a view of determining the amount of sand originally deposited there by the plaintiffs. They measured the area of the lot, and sunk five or six holes down to what they called the original soil, took the depth of the sand as shown by these holes, made a general average, allowing 15% for settlement, and reached the conclusion that there had been placed thereon a quantity of sand amounting *approximately* to 20,965 cubic meters. These holes, it was said, were distributed at intervals over the property so as to enable the witnesses to get an average 'guess' at, or approximation of, the amount delivered.

"One of these experts stated that he did not see this zacate field before it was filled up, and that he did not know how many little ridges there were or how many canals may have existed on the property.

"We cannot assume, in the absence of proof, that these witnesses sunk holes in that part of this large lot where the deep ditches or canals existed or where the swamp was. The correctness of the conclusion reached by these experts depended, to a great extent, on the depth of the holes sunk through the sand, and this depth depended on whether or not they were sunk on the level part of the lot or in the ditches or swamp.

"The evidence, therefore, is uncertain and does not enable us to accurately determine the exact number of cubic feet of sand or earth delivered on the lot; and this is especially true when the evidence shows that the conclusions of the defendants' experts are disputed by two experts called by the plaintiffs, experts of larger experience than those of the defendants and equally as competent to give opinions on this question.

"These experts called by the plaintiffs testified that the amount of sand and earth mentioned as delivered and paid for could have been delivered on this lot and yet show no greater bulk than that which appeared there when the defendants' experts made their measurements, provided a greater percentage were allowed for settlement, and they cited the works of eminent engineers to show that the allowance for settlement should be from 31 to 38 per cent. instead of 15 per cent.

"In view of the fact that this filling was measured at so long a time after it was placed on the lot; in view of the fact that the estimates of these witnesses of the amount delivered is but an approximation or 'guess;' in view of the conflict of testimony regarding such amount; and in view of the fact that the defendants, by their authorized representatives, actually measured the sand and earth at the time of the delivery of each banca load, in the manner directed by the manager of the defendants, we cannot now say that this latter measurement is all wrong and the new measurement all right, especially when there is no proof that any fraud or deceit was practiced on the defendants in the matter of measurements or in the keeping of the accounts thereof.

"The learned judge who tried this case seems to have been of the opinion that because the contract states that the amount of sand to be delivered shall be *'over* 15,000 cu. meters,' therefore it was a conclusive corroboration of his finding that not more than 21,000 cubic meters of sand was placed on the lot.

"If only about 15,000 cubic meters were intended, why did not the defendants stop the delivery when

they knew that 15,000 cubic meters had been delivered? After the amount had gone beyond that mark, why were not the defendants put upon inquiry? Why, if they suspected anything wrong in the measurement, did they not make an investigation?

"Delivery of filling began early in July, 1901, and down to October 20th of that year the amount delivered exceeded 16,000 cubic meters according to the defendants' own record. Why, then, if only about 15,000 cubic meters, or even 21,000 cubic meters were sufficient to fill the lot, did the defendants let the filling go on during the remainder of October, the whole of November and December, 1901, and January and February and down to the latter part of March 1902? And this without a word of complaint from the defendants during its progress, and not a word afterwards until plaintiffs began to press defendants for their unpaid balance on the house contract."

The contract for this filling (Rec., 7) provides that "material will be measured in whatever way the said Campbell & Go-Tauco—with the approval of Behn, Meyer & Co.—deem most expedient." As matter of fact, the measurement of material was left in the hands of plaintiffs in error. They employed their own representatives to make the measurement, and payments were made to defendants in error only on receipt given by Behn, Meyer & Co.'s representatives (Rec., 18, 29). There can be no dispute as to these facts; they are frankly admitted by Mr. Dittmar in his testimony. One of Behn, Meyer & Co.'s representatives, employed to measure the filling material, was called, and testified (Rec., 31). He says he noted in certain books the sand delivered. These books he took to Behn, Meyer & Co.'s office. This method of account was ordered by their manager, Mr. Kattenkamp, and later by the managing partner, Mr. Dittmar. Witness testifies that Mr. Kattenkamp, Behn, Meyer & Co.'s manager, instructed him how to measure the

material, and he followed his instructions. He measured the water line, or load line, of the bancas, or scows, in which the sand was delivered, and so computed the cargo. He says (Rec., 33):

> "There are certain marks on both sides of the bancas, and I measured the contents by those marks, which they use on the water line; and it was the instruction of Mr. Cottoncamp [Kattenkamp] that it was not necessary to measure the bancas."

This measurement by displacement is, of course, a perfectly proper and often adopted method of computation. Under the conditions it was probably the most accurate and feasible method which could have been employed.

There is, as stated by the court below, no evidence of fraud on the part of Cereal or any other person employed by Behn, Meyer & Co. to make these measurements, or of any one else. The only evidence to overcome the *prima facie* proof of their written receipts for material is the testimony of the two witnesses Case and Loper, who first examined the ground many months after the filling was completed. They made an estimate based on a superficial measurement and the sinking of five holes in different parts of the lot. The estimate, manifestly, is guesswork at the best. It fails utterly to overcome the presumption raised by plaintiffs in error's own receipts.

The measurement being made by these men employed by Behn, Meyer & Co., the case is controlled by section 1598 of the Civil Code, which provides that:

> "If the person who has to approve the work is a third person, his decision shall be final."

Where under a contract the work done or materials furnished are to be measured by some agreed person, his determination as to quantities and amounts is conclusive on the parties in the absence of fraud or of such gross error as

to imply bad faith. This rule was settled by this court in *Kihlberg vs. United States,* 97 U. S., 398. In this case Kihlberg made a contract with the United States for the transportation of Government stores and supplies which provided that the distance between the points of transportation should be ascertained and fixed by the chief quartermaster. The contractor, Kihlberg, disputed the correctness of the quartermaster's estimates and brought suit in the Court of Claims to recover on the basis of additional mileage. This court, by Mr. Justice Harlan, after stating that there was no proof of fraud or bad faith on the part of the quartermaster in making his ascertainment of distances, said (p. 401):

> "The difference between his [the quartermaster's] estimate of distances and the distances by air line, or by the road usually traveled, is not so material as to justify the inference that he did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, as collected from their agreement. His action cannot, therefore, be subjected to the revisory power of the courts without doing violence to the plain words of the contract."

And this rule was affirmed in *Sweeney vs. United States,* 109 U. S., 618; and again in *Martinsburg, etc., R. R. Co. vs. March,* 114 U. S., 549.

The case of *Chicago & Santa Fé Railroad vs. Price,* 138 U. S., 185, is on all fours with the case at bar, and the decision of this court therein should be here controlling. The contract was for the construction of a railway road bed. It provided for monthly payments to the contractor "on the certificate of the engineer," whose determination as to quantities and amounts should be conclusive. On a subsequent estimate of another engineer it was claimed that the estimates on which monthly payments were made were excessive, and the railroad company retained the balance of 10 per cent. of monthly payments held to await completion of contract. The contractors brought an action to recover

this balance. The facts as found are thus stated by Mr. Justice Harlan in the opinion of the court (p. 194):

> "The work was in four divisions, each division being in charge of an assistant or division engineer, who acted under the general direction of the chief engineer. The agreement provided for monthly payments to the contractor, on the certificate of the engineer 'for work done;' ten per cent. from the value thereof to be retained by the company until the whole work was completed in accordance with the contract. The work was under the immediate supervision of the division engineer. On the first day of each month he made up and forwarded to the assistant chief engineer an estimate of work done on each section of his division, according to quantities and classifications. Upon such estimates the assistant chief engineer ascertained the amount due the contractor to the beginning of the month. These monthly estimates were approved by both the assistant chief engineer and chief engineer. This course was pursued until the work was substantially completed, and was accepted and taken possession of by the company. Subsequently, without the knowledge or co-operation of the contractors, Baker, a subordinate engineer of the railroad company, who had not supervised the work of the plaintiffs, re-estimated and reclassified it, and upon such re-estimate and reclassification, which were approved by the chief engineer, the company claimed that the monthly estimates upon which the plaintiffs had been paid from time to time were much too large."

On the facts as thus stated the court held (p. 195):

> "We are of opinion that the ultimate facts, as found by the court, do not authorize the railroad company to go behind the estimates from time to time by its division engineer, which were approved and certified by the assistant chief engineer and chief engineer. Within a reasonable interpretation of the contract, the last monthly estimate of work done on division nine (that being the only division here in dispute) followed by the acceptance by the company of the

whole work, was a certificate of complete performance entitling the plaintiffs to be paid in full according to the terms of the contract. While there was evidence tending to show that the estimates by the division engineer, upon which the last monthly certificate was based, were not made up from actual measurements on the ground, but from reports by subcontractors, there was, also, evidence tending to show that the remeasurements and reclassifications which the company caused to be made after the completion and acceptance of the work, and which it calls the 'final estimate,' were inaccurate. But there is no fact distinctly found indicating fraud upon the part of the company's engineers, or such gross mistakes by them as imply bad faith. It is found only that the monthly estimates might, with reasonable care, have been made nearly accurate, and that, *if* the remeasurements and reclassifications were correct, the discrepancy between them and the monthly estimates, upon which the plaintiffs were paid from time to time, could be explained only upon the ground of negligence, incompetency or dishonesty upon the part of the division engineer. But the court did not find that the monthly estimates were inaccurate, or that the chief or division engineer was dishonest, or that the subsequent remeasurement and reclassification were correct. The mere incompetency or mere negligence of the division or chief engineer does not meet the requirements of the case, unless their mistakes were so gross as to imply bad faith."

In the case at bar, where the persons who measured the material were appointed by plaintiffs in error, were in their employ, and followed the method of measurement designated by them, the rule as above stated surely applies with greatest force.

There being absolutely no proof of fraud, and the evidence being entirely insufficient to establish mistake, let alone error so gross as would imply bad faith, we submit that the action of the court below in rejecting the second counterclaim of plaintiffs in error is manifestly correct.

As said in the court's opinion (Rec., 105):

> "This case, in the absence of evidence of a mutual mistake, is governed by the doctrine of estoppel. The defendants measured the sand, they receipted for it and they paid for it. They cannot now say they did not receive it. It comes within the principles laid down in Austin *v.* Wauful, 36 S. R. (N. Y.), 779, where it was held that a receipt given by the plaintiff in that case for the property in question estopped him from denying that he had the property when the action was brought.
>
> "In Behring *v.* Somerville (44 At. Rep.,641) it was held that the fact that both parties had equal means of information, and money was paid upon a mistake of fact, cannot, in the absence of fraud, be recovered back, the money being that of the payee.
>
> "It follows that the defendants are not entitled to recover from the plaintiffs the said sum of $52,000 Mexican currency allowed by the court below."

See also *Ogden vs. United States,* 60 Fed. Rep., 725; *Mundy vs. Louisville, etc., Ry. Co.,* 67 Fed. Rep., 633, 637; *Elliott vs. M., K. & T. Ry. Co.,* 74 Fed. Rep., 707, 711.

And the same rule that the estimates of a person agreed to by the parties to the contract cannot be avoided except for fraud, or such gross mistake as would imply bad faith, is laid down in numerous decisions of the State courts and the English cases. Amongst others, in *Dingley vs. Greene,* 54 Cal., 333; *Barton vs. Hermann,* 11 Abb. Pr. N. S. (N. Y. C. Pl.), 381; *Dorwin vs. Westbrook,* 71 Hun. (N. Y.), 405; *Stewart vs. Keteltas,* 36 N. Y., 388; *Wilcox vs. Stephenson,* 30 Fla., 377; *Kork vs. Lull,* 70 Ill., 420; *Snell vs. Brown,* 71 Ill., 133; *Cocy vs. Lehman,* 79 Ill., 173; *Taylor vs. Rem,* 79 Ill., 181; *Bournique vs. Arnold,* 33 Ill. App., 303; *Hudson vs. McCartney,* 33 Wis., 331; *Boettler vs. Tindick,* 73 Tex., 488; *Condon vs. South Side R. Co.,* 14 Gratt. (Va.), 302; *Baron de Worms vs. Mallier,* L. R., 16 Eq., 554; *Sharphe vs. San Paulo R. Co.,* L. R., 8 Ch., 597; *Dunaberg, etc., R. Co. vs. Hopkins,* 36 L. T., 733; *Harvey vs. Lawrence,* 15 L. T. N. S., 571.

Opposing counsel quote the letter of Behn, Meyer & Co., dated April 28, 1902 (Rec., 86), to appellees asserting this alleged excess payment and demanding satisfactory explanation within the next three days; otherwise "our attorneys are instructed to take up the case at once." But they fail to quote the instant reply of Mr. Campbell (Rec., 87), showing that the measurements were made by plaintiffs in error's own representative, were accepted by defendants in error, who on the *same* measurements, "paid the banca men for the sand delivered to me." We invoke examination of this letter. It is significant that no action was brought by plaintiffs in error *then* and nothing done by them until, in their answer filed on November 24, 1902—over six months later—they set up this counter-claim based on the *ex parte* measurements of others made long afterward.

In conclusion, we submit the absurdity of the claim of plaintiffs in error for this alleged overpayment is manifest from the facts that the work was situated where it could be daily inspected by the managers and principals of Behn, Meyer & Co., and that although more than 30,000 cubic meters of sand had been receipted and paid for in December, 1901, no question was raised as to the quantity of material, and during the months of January, February and March, 1902, over 30,000 cubic meters additional were receipted and paid for. The managing partner of plaintiffs in error, Mr. Dittmar, was in Manila from the end of January, 1902 (Rec., 81), yet he took no steps to investigate the matter, but continued to pay for filling material without question; and yet he testifies that he was perfectly familiar with the property.

For the reasons stated, we respectfully submit that the judgment of the court below should be affirmed.

Respectfully submitted,

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Defendants in Error.